part of the year we order the defendant to deliver up vacant possession of the First and Third properties to the plaintiff on or before November 30, 1984. The defendant, however, is ordered to yield up vacant possession of the Second and Fourth properties to the plaintiff on or before September 30, 1984. It follows that the defendant is ordered to pay compensation to the plaintiff in the manner following:

(a) As regards the First property (padi land) the sum of $14,000.00;

(b) As regards the Second property (coconut plantation) the sum of $4,600.00;

(c) As regards the Third property (padi land) the sum of $14,000.00; and

(d) As regards the Fourth property (coconut plantation) the sum of $2,760.00.

In the exercise of our discretion, we do not think we should award interest to be paid by the parties concerned.

Under the circumstances of the case, we allow the plaintiff to set-off against the $26,000.00 which she is ordered to pay to the defendant as compensation.

We therefore set aside that part of the judgment of the learned Judicial Commissioner decreeing specific performance of the contracts marked as Ex. P1 and P2, as well as the order for costs. We order that each party to pay his or her own costs here and in the court below.

To that extent the appeal is allowed.

*Appeal allowed.*

Solicitors: *R.R. Chelliah Bros.; Vadiveloo & Co.*

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## NATIONAL COMPANY FOR FOREIGN TRADE v. KAYU RAYA SDN. BHD.

**[F.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah F.JJ.) February 9, March 23 & July 14, 1984]**

**[Kuala Lumpur – Federal Court Civil Appeal No. 246 of 1983]**

*Practice and Procedure – Pleading – Whether necessary to plead consideration in statement of claim – Application for summary judgement – Requirements – Issue or question to be tried – Contracts Act, 1950, s.2 – R.H.C. 1980, O.14, O.18 rr. 11 & 15.*

In this case the appellant, a state trading entity of Aden entered into an agreement in writing with the respondent, a private limited liability company in Malaysia, whereby the appellant agreed to buy and the respondent agreed to sell timber to be shipped from various ports in Malaysia to Aden. The terms of payment were US$232 per ton C & F. In July 1979 the respondent shipped timber on board the vessel "Senang Island" from Kuantan and the appellant duly made payment under the agreement. While enroute to Aden the vessel was arrested in Singapore and the cargo of timber was unloaded in Singapore. The respondent agreed to take full responsibility for the reshipment of the timber and also agreed to be liable for the freight charges as well as all incidental expenses. Arrangements were made to ship the timber by the "Kota Abadi" to Aden and the appellant advanced the freight of S$907,350/- at the request of the respondent, on the express undertaking of the appellant to pay the aforesaid sum less S$60,405/- which the appellant had agreed to bear. Despite numerous demands the respondent failed to effect payment of the balance. The appellant brought an action against the respondent and the Assistant Registrar directed that summary judgment be entered in favour of the appellant in the sum of S$846,930/-. On appeal the High Court reversed the decree. In his grounds of judgment the learned judge took the view that consideration ought to be expressly pleaded in the statement of claim. The appellant appealed.

**Held:** (1) since "consideration", "agreement" or "contract" have been statutorily defined in the Contract Act 1950 they cannot be said to be material facts and therefore need not be specifically pleaded in the statement of claim;

(2) in this case the respondent has satisfied the Court on affidavit evidence that there is an issue or question to be tried and therefore the application for summary judgment ought to be refused.

*Cases referred to:*

(1) *European Bank* v. *Punjab Bank (No. 2)* [1983] 1 W.L.R. 642.

(2) *Syros Shipping Co.* v. *Elaghill Trading Co.* [1981] 3 All E.R. 189.

(3) *Gold Ores Reduction Co.* v. *Pain* [1892] 2 Q.B. 14.

(4) *Sheba Gold Mining Co.* v. *Trubshawe* [1892] 1 Q.B. 674.

FEDERAL COURT.

*Wong Chong Wah* for the appellant.

*C. Abraham* for the respondent.

*Cur. Adv. Vult.*

Seah F.J. (delivering the Judgment of the Court): This is an appeal from a judgment of the High Court dated July 15, 1983 reversing a decree of the Assistant Registrar directing that summary judgment be entered in favour of the appellant/plaintiff in the sum of S$846,930/- with interest and costs under Order 14 of the Rules of the High Court 1980. Before dealing with the merits of the appeal we would like to dispose of a preliminary submission on the rule of practice. In his grounds of judgment the learned Judge seems to take the view that "consideration" ought to be expressly pleaded in the statement of claim. In support of this view learned counsel for the respondent/defendant relies on a passage appearing in paragraph 18/12/7 of the "White Book" which reads:

"Consideration for any agreement not under seal is a material fact and must be pleaded, except in the case of negotiable instruments where it is presumed."

It was pointed out by learned counsel for the appellant that no authority binding on this court has been cited to support this proposition and the comment of the learned authors appears to be contrary to the specimen court forms contained in *Bullen & Leake's* Precedents of Pleadings and *Atkin's* Court Forms, Vol. 12 dealing with the statement of claim.

We have examined the specimen forms of statement of claim based on agreements not under seal in *Bullen & Leake's* Precedents of Pleadings and *Atkin's* Court Forms and we are unable to find anything to indicate that "consideration" ought to be pleaded specifically. On the other hand, if the defence is to be based on "no consideration" or "a failure of consideration" then the specimen forms show clearly that such a defence should be expressly pleaded [see Order 18 Rule 11].

Now, Order 18 Rule 15 of the Rules of the High Court 1980 states that –

15 (1) A statement of claim must state specifically the relief or remedy which the plaintiff claims; but costs need not be specifically claimed.

(2) A statement of claim must not contain any allegation or claim in respect of a cause of action unless that cause of action is mentioned in the writ or arises from facts which are the same as, or include or form part of, facts giving rise to a cause of action so mentioned; but, subject to that, a plaintiff may in his statement of claim alter, modify, or extend any claim made by him in the indorsement of the writ without amending the indorsement.

In our judgment, Order 18 Rule 15 does not support the statement contained in paragraph 18/12/7 of the "White Book".

A "consideration" is defined by section 2(d) of the Contracts Act 1950 as "when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise." And "every promise and every set of promises, forming the consideration for each other, is an agreement" [ see section 2(e)]. An agreement enforceable by law is a contract [section 2(h)]. In our opinion, since "consideration", "agreement" or "contract" have been statutory defined they cannot be regarded as material facts and therefore need not be specifically pleaded in the statement of claim under Order 18 Rule 7(1). For the above reasons, we are unable to agree with the observation of the learned Judge.

We come now to consider the merits of the appeal. It was submitted by learned counsel for the appellant that the learned Judge in the High Court was wrong to hold that the statement of claim does not disclose an enforceable contract. In so holding, it was contended that the learned Judge was under the misapprehension that "consideration" ought to be specifically pleaded in the statement of claim. We think it appropriate to remind ourselves once again that in every application under Order 14 the first considerations are (1) whether the case comes within the Order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under Order 14. For the purposes of an application under Order 14 the preliminary requirements are:

(i) the defendant must have entered an appearance;

(ii) the statement of claim must have been served on the defendant; and

(iii) the affidavit in support of the application must comply with the requirements of Rule 2 of the Order 14.

It is to be observed that a case is not within Order 14 (a) where no statement of claim has been served on the defendant; (b) where the indorsement on the writ includes a claim or claims

outside the scope of Order 14 as coming within Rule 1(2); (c) where the affidavit in support of the application is defective, e.g. in omitting to state the deponent's belief that there is no defence to the claim or part to which the application relates; (d) where the application is made in an action against the Government [Order 73 Rule 5(1)].

If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a *prima facie* case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him [see Order 14 Rules 3 and 4(1)].

We will assume for the purpose of this appeal that the preliminary requirements have been satisfied and that the case comes within the provisions of Order 14.

It seems to us that the main thrust of the defence of the respondent is contained in paragraph 7 of the affidavit of Ahmad Kamaruzaman bin Mohd. Baria dated November 14, 1982 in which he states that "I verily believe that agreed minutes which the plaintiff (appellant) relied on was made without due consideration and in the circumstances bad in law". The question before us is whether the respondent by this affidavit has satisfied the learned trial Judge that a *bona fide* arguable defence has been raised which ought to be tried.

In *European Bank* v. *Punjab Bank*[1] it was decided by the Court of Appeal consisting of two Lord Justices (Slade and Goff L.JJ.) that where a Judge has decided there is a triable issue on a question of fact, the Court of Appeal would be unlikely to interfere. On the other hand, if the Court of Appeal differed from the Judge only on issues of law, the Court of Appeal should substitute its own view for that of the Judge and give judgment for the plaintiffs under Order 14 Rule 3(1). And in practice, this court will simply approach an appeal of this kind as a rehearing.

Now the facts in this case do not appear to be in dispute and they may be shortly stated.

(a) The appellant are statutory state trading entity having its principal place of business in Aden and the respondent are a private limited company incorporated in Malaysia.

(b) On March 16, 1974 by an agreement in writing under reference KR/NCFT/14/79 the appellant agreed to buy and the respondent agreed to sell 19,392 tons of "Keruing" sawntimber to be shipped from various ports in Malaysia to Aden by the respondent from the months of April to December 1979. The terms of payment was US$232 per ton of 50 cu. ft. C & F full liner terms port of Aden, P.D.R.Y. (People Democratic Republic of Yemen).

(c) In July 1979 the respondent shipped 6049 tons of sawntimber on board the vessel "Senang Island" from Kuantan. The appellant duly made payment under the terms of the said agreement to the respondent in respect of this shipment.

(d) Whilst enroute to Aden the vessel "Senang Island" was arrested in Singapore and the said cargo of sawntimber was unloaded at Singapore.

(e) On October 8, 1979 the respondent agreed to take full responsibility to reship the 6049 tons of sawntimber from Singapore to Aden by another vessel and also agreed to be liable for the freight charges as well as all incidental expenses arising from the cargo being unloaded and stored in Singapore pending reshipment to Aden.

(f) On December 9, 1979 arrangement was made for the shipment of 6049 tons of sawntimber from Singapore to Aden by the vessel "Kota Abadi" and the total freight charges amounting to S$907,350/- to be borne by the respondent.

(g) The appellant advanced the freight charges of S$907,350/- at the request of the respondent and on the express undertaking of the respondent to reimburse the appellant the aforesaid sum less a sum of S$60,405/- which the appellant had agreed to bear, on or before December 31, 1979.

(h) Despite numerous demands the respondent had failed/refused to effect payment of the sum of S$846,930/- to the appellant.

We would pause here to say a few words about agreement on C & F terms. According to a book entitled "The Export Trade" by Clive Schmitthoff, C & F stands for "Cost and freight". Under this clause the seller has to arrange the carriage of

the goods to the named foreign port of destination at his expense but not at his risk [which ceases when he places the goods on board ship at the place of shipment] he does not need to arrange marine insurance which is the concern of the buyer and, if effected, has to be paid by him. In this respect the clause differs from the ordinary CIF clause, but in all other respects the liabilities and duties of the parties are the same as under a CIF contract.

Learned counsel for the respondent submitted that under a C & F contract the legal responsibility of the respondent/seller ceased when the sawntimber were loaded on board the vessel "Senang Island" at Kuantan. And when the vessel "Senang Island" was arrested in Singapore the appellant applied to the Singapore High Court to off-load the sawntimber so that they could be reshipped to Aden by another vessel. By so doing the appellant exercised right of ownership over the sawntimber in as much as the property of the sawntimber had passed or was deemed to have passed to the appellant at the place of shipment in Kuantan. It was therefore argued that when the respondent signed the Agreed Minutes on 8.10.79 and undertook full responsibility to reship the 6049 tons of sawntimber from Singapore to Aden in another vessel at the respondent's own expense including the payment of freight, there was no consideration to support the alleged agreement.

Reliance was placed on the case of *Syros Shipping Co.* v. *Elaghill Trading Co.*[2]. In that case the shipowners chartered their vessel to the charterers who used it to carry a consignment of tractors from Sweden to Yemen. The freight was prepaid by the Yemeni consignees to the charterers and bill of lading signed by the master of the vessel and binding on the owners were issued to the consignees. In the course of the voyage the charterers became insolvent and defaulted in the payment of hire to the owners. Because of congestion in the port at Yemen, the owners ordered the vessel to proceed to other ports to discharge the rest of her cargo. Before the vessel returned to the Yemen port the owners negotiated with the consignees for an extra payment for the discharge of the cargo free of any liens. The consignees agreed to pay an extra US$31,000 over and above the freight already paid. However, when the cargo had been discharged the consignees refused to pay the US$31,000. The dispute was referred to an arbitrator who held that there was no consideration for the agreement but that the consignees were nevertheless estopped from departing from the agreement. The arbitrator therefore upheld the owners' claim. The consignees applied to have the award set aside on the ground that it contained an error of law on its face.

Lloyd J. held that the shipowners had no claim, other than by virtue of the agreement, for the US$31,000 they were seeking to recover from the consignees, and in the absence of consideration they could not enforce that agreement or rely on equitable estoppel as creating an independent cause of action.

For the appellant it was contended that *Syros Shipping case* can be distinguished from the instant case in that there was a "naked promise" in *Syros Shipping* case whereas here, the Agreed Minutes of October 8, 1979 represented a Compromise Agreement which was reached by the appellant and the respondent after a series of meetings commencing from October 1 to 8, 1979 resulting in the settlement of the following three issues, viz.:

(a) the vessel "Senang Island";

(b) outstanding order of Contract dated March 16, 1979 under reference KR/NCFT/14/79;

(c) balance of the order under Indent BC/63/78.

With respect, these do not appear to have been pleaded by the appellant. In the statement of claim it is alleged that following the undertaking by the respondent to reship the sawntimber and to be responsible for the cost of freight charges from Singapore to Aden the parties had agreed on new dates regarding the shipment of the balance of the sawntimber under the said contract. Although not pleaded learned counsel for the appellant further submitted that on October 16, 1979 the appellant and the respondent signed another fresh sale and purchase agreement vide KR/NCFT/44/79 in respect of 11,600 tons of "Keruing sawntimber (Redwood)".

In *Gold Ores Reduction Co.* v. *Pain*[3] it was held that for the purpose of Order 14 application the statement of claim must be complete and good in itself; any defect or omission cannot be corrected or supplemented by the plaintiff's affidavit. Furthermore, if the defect is one of substance, the application for summary judgment

will be dismissed [see *Sheba Gold Mining Co.* v. *Trubshawe*[4]].

Applying these to the facts of this case, we tend to agree with the decision of the learned Judge that the application for summary judgment under Order 14 ought to be refused. Unlike the learned Judge, we prefer to base it on the ground that the respondent has satisfied the Court on affidavit evidence that there is an issue or question in dispute which ought to be tried. The appeal is therefore dismissed with one-half costs to the respondent to be taxed. The deposit of $500/- to be paid to the respondent on account of taxed costs. We would order that the trial take place before another Judge.

*Appeal dismissed.*

Solicitors: *Skrine & Co.; Shearn Delamore & Co.*

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## ASIA TELEVISION LTD. & ANOR. v. VIWA VIDEO SDN. BHD. & CONNECTED CASES

**[F.C. (Abdul Hamid C.J. (Malaya), Hashim Yeop A. Sani & Abdoolcader F.JJ.) July 25 & August 3, 1984]**

**[Ipoh – Federal Court Civil Appeals Nos. 215, 240, 241 & 244 of 1983]**

*Practice & Procedure – Ex parte application for "Anton Piller" order obtained by appellants to restrain respondent from reproducing, disposing etc, cinematograph films in the form of video tapes over which the appellants claimed copyright – Injunction set aside on ground that as video tapes were uncensored the tapes were tainted with illegality and had therefore no copyright – Appeal – No sufficient nexus between two legislation – Non-compliance with provisions of Films (Censorship) Act does not affect the acquisition of copyright under the Copyright Act – Copyright Act, 1969 – Films (Censorship) Act, 1952.*

*Copyright – Cinematograph films in video tapes uncensored – Non-compliance with provisions of Films (Censorship) Act does not affect the acquisition of copyright under Copyright Act – No sufficient nexus between two Acts – Films (Censorship) Act, 1952 – Copyright Act, 1969.*

In this case the appellants who claimed copyright in certain films in video cassette form alleged infringement by the respondents of their copyright and instituted proceedings for relief by way of injunctions, delivery of the offending articles, discovery, and damages. On the issue of the writs they applied *ex parte* for and obtained *Anton Piller* Orders. The respondents then applied to set aside these orders and for the return of all the cassettes, documents and other articles removed from their premises pursuant to the *ex parte* orders. The learned Judge found no merit in the contentions advanced by the respondents in their application to set aside the orders made except on the question of the publication of the films under the Copyright Act taken in conjunction with the Films (Censorship) Act. He held that as no certificates of approval were obtained as required under the Films (Censorship) Act there was no valid publication of the films within the provision of the Copyright Act as the publication in Malaysia must be a lawful one. He accordingly adjudged the publication of the films by the appellants to be unlawful, illegal and an offence punishable under the Films (Censorship) Act and decided in effect that no copyright had been acquired as a result. He therefore allowed the respondent's applications, set aside the *ex parte* orders he had previously made and ordered the return of the articles removed from the respondent's premises. – See [1983] 2 M.L.J. 409. The appellants appealed.

**Held** allowing the appeals: (1) there was no prohibition in either of the Acts which would preclude the appellants from acquiring copyright if they were otherwise qualified although they were in breach of the provisions of the Film (Censorship) Act which is concerned only with criminal liability and provides a penalty for breach of its relevant provisions;

(2) non-compliance with the provisions of the Film (Censorship) Act does not affect the acquisition of copyright under the Copyright Act. There is no express or implied prohibition linking the respective requirements of the two statutes and accordingly no nexus to justify reading these conjunctively and importing the requirements of one as a condition precedent to the operation of the other;

(3) in this case since the appellants have in the first instance *ex facie* acquired copyright this needs to be protected pending a full hearing of the actions instituted.

*Cases referred to:*

(1) *Anton Piller KG* v. *Manufacturing Processes Ltd.* [1976] Ch. 55.
(2) *Curragh Investments Ltd.* v. Cook [1974] 1 W.L.R. 1559.
(3) *St. John Shipping Corporation* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267.
(4) *Shaw* v. *Groom* [1970] 2 Q.B. 504.
(5) *Cate* v. *Devon and Exeter Constitutional Newspaper Company* (1889) 40 Ch.D. 500.
(6) *London & Harrogate Securities Ltd.* v. *Pitts* [1976] 1 W.L.R. 1063.
(7) *Batu Pahat Bank Ltd.* v. *Official Assignee of Property of Tan Keng Tin, A Bankrupt* [1933] A.C. 691, 698; [1933] M.L.J. 237, 238.

FEDERAL COURT.

*Datuk V.L. Kandan (S.F. Wong* with him) for the appellants.

*W.S.W. Davidson (H.R. Paul* with him) for the respondents in F.C.C.A. 215/83 and 241/83.

Respondents in F.C.C.A. 240/83 and 244/83 in person.

*Cur. Adv. Vult.*